

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DENA CHARYNE THOMPSON,

Defendant-Appellant.

UNPUBLISHED

January 26, 2010

No. 286849

Allegan Circuit Court

LC No. 08-015612-FC

Before: Stephens, P.J., and Gleicher and M. J. Kelly, JJ.

PER CURIAM.

Defendant Dena Charyne Thompson appeals as of right her jury convictions of first-degree premeditated murder, MCL 750.316(c), conspiracy to commit first-degree murder, MCL 750.157a, and of being an accessory after the fact to a felony, MCL 750.505. The trial court sentenced defendant to life in prison without the possibility of parole for both the first-degree murder and conspiracy convictions, and to two to five years in prison for the conviction of being an accessory after the fact to a felony. Because we conclude that there were no errors warranting relief, we affirm.

Defendant first argues that the trial court abused its discretion when it excluded Dr. Richard Ofshe's expert testimony concerning psychologically coercive interrogation techniques under MRE 702. Specifically, defendant contends that the trial court erred when it concluded that the jury was able to watch the recordings of the interrogation and make its own determination without the aid of an expert witness despite Dr. Ofshe's testimony to the contrary, and erred by usurping the jury's role in determining credibility by preventing the jury from hearing Dr. Ofshe's testimony about coercive interrogation techniques. This Court reviews a trial court's decision to permit or exclude an expert's testimony for an abuse of discretion. *People v Steele*, 283 Mich App 472, 480; 769 NW2d 256 (2009).

MRE 702 governs the admissibility of expert testimony and provides:

If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of

reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

MRE 702 requires that the witness be an expert, that there be facts in evidence that require or are subject to examination and analysis by a competent expert, and the knowledge sought from the expert is “in a particular area that belongs more to an expert than to the common man.” *Surman v Surman*, 277 Mich App 287, 308; 745 NW2d 82 (2007).

In the present case, the trial court determined that Dr. Ofshe’s testimony would not “assist the trier of fact to understand the evidence or to determine a fact in issue” because the jury would be able to view the entirety of the interviews at trial and make their own determinations regarding whether defendant’s confession was credible. See MRE 702. We agree with the trial court’s conclusion. Dr. Ofshe’s testimony focused on identifying various methods and strategies utilized by the interrogators when interviewing defendant and then explaining how those techniques might be coercive. Absent Dr. Ofshe’s own claim that this information was not a matter of common sense and that one needed training to properly identify the various methods, there is nothing in the record to suggest that the jury would not understand the evidence from the interrogation recordings or that they would not be able to properly assess the weight and credibility to accord defendant’s statements—that is, there is no indication that the jury needed expert testimony in order to determine whether defendant’s confession was coerced, reliable, or credible. Credibility is a question for the jury—not for expert witnesses. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (2009); see also *Keywell and Rosenfeld v Bithell*, 254 Mich App 300, 338-339; 657 NW2d 759 (2002) (noting that MRE 702 permits expert testimony when it will assist the trier of fact and, where the proposed expert had no “specialized knowledge” of the witness’s credibility, expert testimony was unnecessary because the jury and proposed expert were equal in their abilities to determine whether the witness was telling the truth.). Although Dr. Ofshe indicated that he would not testify concerning the theory of false confessions or opine that defendant was actually coerced into confessing by the officers, implicit in his proposed testimony was the conclusion that defendant’s statements were in fact coerced or false. The trial court correctly concluded that the weight and credibility to assign to defendant’s statements were properly left to the jury and, therefore, its determination that the proposed expert evidence was unnecessary did not interfere with the jury’s ability to properly assess defendant’s statements. Under MRE 702 the proponent of expert testimony bears the burden to show that specialized knowledge is necessary to a proper understanding of the evidence and that the specialized knowledge will assist the trier of fact in making its findings. Defendant failed to meet that burden. The trial court’s decision to exclude the expert testimony was within the principled range of outcomes. *People v Unger*, 278 Mich App 210, 217; 749 NW2d 272 (2008).

Defendant also argues the exclusion of Dr. Ofshe’s testimony violated her due process right to present a defense. Specifically, defendant argues that the trial court’s decision prevented the jury from hearing how psychological coercion might have accounted for defendant’s admissions and, for that reason, the jury had no reason to disbelieve defendant’s confession. According to defendant, Dr. Ofshe would have testified about the psychologically coercive interrogation techniques and identified that the interrogators were the source of defendant’s admissions and that the admissions were contaminated, unreliable, and uncorroborated. A defendant has a constitutional right to present a defense. *Id.* at 249-251. “However, an

accused's right to present evidence in his defense is not absolute." *Id.* at 250. "The right to present a defense may be limited by rules of procedure and evidence designed to ensure fairness and reliability." *People v Petri*, 279 Mich App 407, 420; 760 NW2d 882 (2008).

Defendant relies on *Crane v Kentucky*, 476 US 683; 106 S Ct 2142; 90 L Ed 2d 636 (1986), for the proposition that she was entitled to present Dr. Ofshe's testimony to a jury and that a deprivation of that entitlement violated defendant's due process right to present a defense. In *Crane*, before the trial began, the trial court determined that the defendant's confession was voluntary. The defendant sought to "introduce testimony about the physical and psychological environment in which the confession was obtained" at trial. *Id.* at 684. However, the defendant was not allowed to present that evidence. *Id.* at 686. "The trial court ruled that the testimony pertained solely to the issue of voluntariness and was therefore inadmissible." *Id.* at 684. On appeal, the defendant argued this ruling deprived him his constitutional right to present a defense. *Id.* The United States Supreme Court held that "the requirement that the court make a pretrial *voluntariness* determination does not undercut the defendant's traditional prerogative to challenge the confessions' *reliability* during the course of the trial." *Id.* at 688. The Court noted, "[i]ndeed, stripped of the power to describe to the jury the circumstances that prompted his confession, the defendant is effectively disabled from answering the one question every rational juror needs answered: If the defendant is innocent, why did he previously admit his guilt?" *Id.* at 689. The Court held that the trial court erred when it excluded evidence of the environment in which the defendant made his confession because this evidence was highly relevant to the defendant's defense that he did not commit the crime and that his confession was not to be believed. *Id.* at 691.

Defendant's reliance on *Crane* is misplaced. Unlike the defendant in *Crane*, who was not permitted to present any evidence about the circumstances surrounding his confession, defendant argued that her confession was unreliable and not credible, presented evidence regarding the circumstances of the confession and, despite various objections during the trial, cross-examined the detectives regarding their interrogation techniques. Contrary to defendant's contention, the jury was able to hear how defendant might have been psychologically coerced and were able to view the interrogations. Because defendant was given the opportunity to present evidence regarding the environment surrounding her confession and to argue that her confession was unreliable, defendant has failed to establish she was denied an opportunity to present this defense.

Defendant also asserts that if the trial court had considered Dr. Ofshe's testimony, the trial court would have ruled that defendant's statements were involuntary and that the trial court's refusal to consider Dr. Ofshe's testimony when making this determination was improper. "The use of an involuntary statement coerced by police conduct offends due process under the Fourteenth Amendment." *People v Wells*, 238 Mich App 383, 386; 605 NW2d 374 (1999). To determine if a statement was voluntary:

the trial court should consider, among other things, the following factors: the age of the accused; his lack of education or his intelligence level; the extent of his previous experience with the police; the repeated and prolonged nature of the questioning; the length of the detention of the accused before he gave the statement in question; the lack of any advice to the accused of his constitutional rights; whether there was an unnecessary delay in bringing him before a

magistrate before he gave the confession; whether the accused was injured, intoxicated or drugged, or in ill health when he gave the statement; whether the accused was deprived of food, sleep, or medical attention; whether the accused was physically abused; and whether the suspect was threatened with abuse. [*People v Cipriano*, 431 Mich 315, 334; 429 NW2d 781 (1988).]

“The absence or presence of any one of these factors is not necessarily conclusive on the issue of voluntariness. The ultimate test of admissibility is whether the totality of the circumstances surrounding the making of the confession indicates that it was freely and voluntarily made.” *Id.*

Defendant complains that the trial court abused its discretion when it relied on MRE 702, to determine whether Dr. Ofshe’s testimony would not be helpful to the trier of fact because MRE 104(a) and 1101(b)(1) make it clear that the Rules of Evidence do not apply to the voluntariness hearing. We agree the rules of evidence, including MRE 702, do not apply during a *Walker*¹ hearing. MRE 104(a); MRE 1101(b)(1). *People v Richardson*, 204 Mich App 71, 80; 514 NW2d 503 (1994). Nevertheless, the trial court was entitled to determine the amount of weight to afford the expert witness’ testimony when making its findings regarding the voluntariness of defendant’s statement. *People v Sexton (After Remand)*, 461 Mich 746, 752; 609 NW2d 822 (2000). In its written opinion, the trial court noted that Dr. Ofshe’s testimony was not helpful to determine if defendant’s statement was voluntary. Thus, the trial court did not fail to consider the evidence, but rather decided not to afford any weight to that testimony. And this Court will not second-guess the trial court’s determinations concerning the weight and credibility of witness testimony. *Id.*

Additionally, after a thorough review of the record, we agree with the trial court’s determination that defendant’s admissions were voluntary. The record indicated that defendant was 38-years-old, was of at least average intelligence, but had little to no interaction with police before the week of the victim’s death. The four interrogations lasted approximately 9-1/2 hours over three days and defendant repeatedly changed her statements and slowly admitted to her involvement throughout the course of the interrogations. She was repeatedly advised of her *Miranda*² rights, and there is no evidence of a delay in bringing her before the magistrate. Further, no evidence existed to support that defendant was injured, intoxicated, drugged or in ill health when she made her incriminating admissions, and she was repeatedly offered water and at least one bathroom break. Defendant never indicated that she was hungry or deprived of food or sleep, and there is no indication that defendant was physically abused or threatened with abuse. In sum, there was no basis for finding that her statements were involuntary under *Cipriano*.

There were no errors warranting relief.

¹ *People v Walker (On Rehearing)*, 374 Mich 331, 337-338; 132 NW2d 87 (1965).

² *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

Affirmed.

/s/ Cynthia Diane Stephens

/s/ Elizabeth L. Gleicher

/s/ Michael J. Kelly